

NO. 48949-0

**COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON**

STATE OF WASHINGTON, RESPONDENT

v.

STEVEN YELOVICH, APPELLANT

Appeal from the Superior Court of Pierce County
The Honorable Jerry Costello, Judge

No. 15-1-02224-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO APPELLANT'S ASSIGNMENTS OF ERROR.

1. Did the trial court properly refuse instructions on defense of self and property at defendant's trial for violating a no-contact order as each theory was pretext for his decision to violently attack the protected party while she tried to flee?
2. Was the State appropriately allowed to reopen its case so the victim could testify about the attack before the jury was instructed as the internal miscommunication that delayed her appearance did not justify withholding proof pre-trial discovery prepared defendant to address?
3. Should defendant's premature request to pass costs along to our taxpayers be denied when a cost bill has yet to be filed and there is no injustice in a recidivist domestic-violence offender being ordered to repay the public for his appeal?

B. STATEMENT OF THE CASE.

1. Procedure

Defendant was tried for jumping bail and violating a domestic violence no-contact order by assaulting the protected party. CP 47. Pre-trial, he asserted a defense of general denial. 2RP 84. After jury selection, defense of self and property was raised to account for his attack upon the protected party. 2RP 84; 3RP 249-51. The court reserved ruling on the

availability of corresponding instructions until factual and legal support for those theories was presented. 2RP 89-90. Both instructions were withheld when that support failed to materialize. 4RP 379-83.

Internal miscommunication led the State to proceed believing the victim could not be found. 1RP 24. Defendant's guilt was proved through other witnesses. CP 123.¹ An off duty safety officer saw him attack the protected party in broad daylight on a public street. 2RP 123-31. Photographs documenting her injuries were admitted with the court order purposed to prevent such an assault and documents proving the bail jump. Ex. 1, 4-18, 20-21. Defendant testified. 3RP 245-85; 4RP 295-97. The victim was escorted to court by Department of Corrections the next day after the State stumbled on to that means of securing her attendance the night before. 4RP 292-94. The State's motion to reopen its case for her testimony was granted over defendant's objection. There was no prejudice as he received notice of her anticipated testimony in pre-trial discovery, he was given an opportunity to interview her and he was permitted to respond to her testimony in surrebuttal. 4RP 293-94, 297-306-08.

A properly instructed jury convicted him as charged. 432-34; CP 62-65. His prior convictions include DV assault, DV harassment and DV violation of a no-contact order. CP 100. The 15 month sentence he received reflected that the court "repeatedly directed [him] not to have any

¹ CP above CP 122 estimate supplemental designations.

contact with [the victim]. And he repeatedly ignored that." 4RP 459-61; CP 104. The court perceived he tried to deceive jurors about those contacts. 4RP 460. His notice of appeal was timely filed. CP 113.

2. Facts

Forty-seven year old Faith De Armond had been dating defendant for more than 5 years on June 7, 2015, when he attacked her in broad daylight on a public street. 3RP 254; 4RP 320, 322-24. She is "a small lady" with "fragile" skin. 2RP 168. Defendant is taller than her. 3RP 277. And he weighed more than her. 3RP 277. About 30 minutes before the attack, they had been at a house where they lived in violation of a restraining order naming her as the protected party. 2RP 124; 3RP 245; RP 246; 4RP 326-27, 341-42, 348; Ex.1. She walked away from the house when he started "getting violent." 4RP 327. She "can usually sense it when he's getting ready to snap." 4RP 327-28. She "wanted to get away from him." 4RP 349. "At first [she] walked[,] then [] realized he was getting in the car and [she] ran." 4RP 329. She "figured it would be best if [she] ran as far as [she] could[.]" 4RP 328. He "drove up on [her]," which is to say he "[b]asically [] ran [her] down without hitting [her] with his car[.]" 4RP 329, 349. He parked, "snuck up" and "attacked [her]." 4RP 329, 349.

"[A]ll of a sudden [she] was upside down." 4RP 329. "[I]t was just – it was so quick. So fast." 4RP 329. Defendant "pushed [her] to the ground" where he dragged her across rough gravel while trying to take the purse strapped to her body. 2EP 155; 4RP 333, 337, 349. The skin on her

elbow broke open and bled. 2RP 155; 4RP 337. A rock embedded in her arm. 4RP 338. "[H]e punched [her] a few times [] in [the] face." 4RP 353. Her "scraped" face turned red, then bruised. 4RP 353-54. The beating marked her with other "scratches, bumps and bruises." 4RP 357. Still, she tried to defend herself by punching upward as he hovered above. 4RP 333-34, 351-53. He "bounc[ed] her off the ground," bounced "the side of [her] head" against the ground, and "bea[t] [her]." 4RP 325, 351-52.

The beating continued until a Good Samaritan intervened. Off duty public safety officer Andrew Norman was heading home from work when, in broad daylight, he "saw a man straddling a female ... striking her" on the side of the road. 2RP 125-27. Norman could not tell if they were open or closed-handed strikes, for all he saw were the man's "elbows coming up and down." 2RP 125-27. Nor could he see the blows impact from his vantage. 2RP 127, 141. But Norman was witnessing defendant "attac[k]" De Armond. 2RP 127, 131; 4RP 339, 353-54. Norman parked, retrieved a camping machete from his truck for protection and approached. 2RP 128-29; 4RP 339, 354-55. He was "[a]nxious," knowing he "was going to do something about" the attack as that is "the type of person" he is. 2RP 131, 136. From "about four feet" away, he saw defendant "lif[t] her up off the ground and sla[m] her on the ground," "[p]robably more than three times." 2RP 128, 138, 143. Norman yelled at defendant "to get off, and leave her alone." 2RP 128. Defendant complied. 2RP 128, 132. Another Good Samaritan stood by as Norman called 911 for help. 2RP 132.

De Armond "seemed scared." 2RP 129. "[S]he was crying," "disheveled." 2RP 129-30. It "looked like she was defending herself" with her arms raised protectively across her face. 2RP 138. Defendant "seemed angry." 2RP 129. His "eyes [] squinted." 2RP 130. His jaw and fists were "clenched." 2RP 130. De Armond told Norman she needed medical aid, which he conveyed to 911. 2RP 133. At trial, she expressed her gratitude for him, describing him as "[t]he man that saved [her]." 4RP 340.

Medical aid arrived. 2RP 133, 139. They treated her on scene. 2RP 133-34, 141-42. Defendant did not require medical attention. 2RP 134; 3RP 185-86, 276. He claimed De Armond stole his phone, in a "[s]tern, angry" voice. 2RP 134. Yet there was no phone in sight during the attack. 2RP 134-35. He never claimed to be the victim of an attack, nor did he describe being afraid of De Armond. 2RP 140.

Police arrived. 2RP 133, 138-39. Deputy Lopez perceived De Armond's mannerisms were off. 2RP 150. She had difficulty focusing as if intoxicated, yet the actual cause of her strange behavior was unclear. 2RP 150, 169. She convulsed. 2RP 152. Her injuries, which included road rash from being dragged, were documented. 2RP 152, 154, 165-66; 4RP 333, 337, 349; Ex. 4-11. Some bruising was consistent with defensive wounds sustained while being struck on the ground. 2RP 166. But she did not have redness across the thin-fragile skin of her small knuckles that one would expect to see if she struck defendant with any force. 2RP 168. A records

check revealed a "domestic violence no-contact order" issued to protect her from him. 2RP 156-59; Ex.1.

Defendant chose to testify. 3RP 245; 4RP 297-306. According to him, he was moving boxes out of a shed. 3RP 247. He was separated from his car by a 4 ½ foot opaque cedar fence. 3RP 247, 260-61, 263, 280-81. The car was unlocked, on the other side of the fence, in a driveway, with its "broken out" passenger-side window, adjacent to a street frequently traveled by pedestrians. 3RP 247-48, 260-62, 264. The car remained mostly unattended in that condition for 45 minutes to 1 hour from the time he arrived to the moment he claimed to catch a glimpse of "somebody" walking by a neighboring house. 3RP 248, 260, 262-63.

Preoccupied moving boxes, he could not say if the person walked along the same side of the street as his car. 3RP 248,260, 264. He allegedly noticed property missing from his car, in particular a cell phone. 3RP 248, 263. And he supposedly first surmised De Armond was the one he caught a glimpse of upon walking into the street. 3RP 248-49.

His only *proof* of her role in the phone heist was her act of turning to look at him—her act of looking over her shoulder at an angry man she knew to be prohibited from contacting her because of domestic violence. 3RP 249, 265-66. He chased her down with his car. 3RP 249, 267; 4RP 329, 349. By his own account, "[i]t was an irrational, radical move." 3RP 267. Once in range, he allegedly approached her demanding his phone; whereupon, she reacted by swinging her purse at him. 3RP 249. Having no

idea if the phone was in it, he "yanked it [] to break the strap." 3RP 249-50. She fell. 3RP 250. He conceded she did not pose a threat. 3RP 270. Still, he "tugged on the strap a couple more times." 3RP 250. He claims to have "left it at that." 3RP 250; *but see* 2RP 128, 138, 143. On cross-examination, he conceded it would not be self-defense for him to grab, punch, or slam her to the ground. 3RP 271-72. He admitted knowing an order prohibited his contact with her. 3RP 256-57, 267-68; Ex.1. Bail jumping was also proved. 3RP 205-17, 253, 279-80.

C. ARGUMENT.

Our Domestic Violence Protection Act protects victims while communicating that violent behavior will not be tolerated. *City of Auburn v. Solis-Marcial*, 119 Wn. App. 398, 403, 79 P.3d 1174 (2003).

1. INSTRUCTIONS ON DEFENSE OF SELF AND PROPERTY WERE PROPERLY REFUSED AT DEFENDANT'S TRIAL FOR VIOLATING A DV PROTECTION ORDER AS EACH DEFENSE WAS A PLAIN PRETEXT FOR HIS DECISION TO VIOLENTLY ATTACK THE PROTECTED PARTY WHILE SHE TRIED TO FLEE.

A defendant is only entitled to instructions on his theory when it is supported by the evidence. *State v. Theroff*, 95 Wn.2d 385, 389, 662 P.2d 1240 (1980). "[T]he right of self-defense does not imply the right of attack [] or permit action done in retaliation[n]." *State v. Janes*, 121 Wn.2d 220,

240, 850 P.2d 495 (1993); *State v. Walker*, 40 Wn. App. 658, 662, 700 P.2d 1168 (1985). The theories advanced in this case required defendant to adduce credible evidence he used no more force than was necessary to protect himself or his property. RCW 9A.16.020(3). A trial court's refusal to give such instructions is reviewed for an abuse of discretion when based on factual disputes. *State v. Walker*, 136 Wn.2d 767, 771-72, 966 P.2d 883 (1998). *De novo* review is applied to legal rulings. *Id.* Under either lens, the decision will be affirmed if supported on any basis. See *State v. Norlin*, 134 Wn.2d 570, 582, 951 P.2d 1131 (1998).

This issue does not implicate the bail jumping conviction. The jury convicted defendant of violating a DV no-contact order. CP 74 (Inst.6); RCW 26.50.110(4). He conceded knowing the order prohibited him from contacting De Armond. 3RP 256-57; 267-68. Ex.1. Testimony from her and a Good Samaritan proved defendant beat her beside a street in broad daylight until the Good Samaritan intervened. 2RP 125-43; RP 329-52. The victim was a small-fragile person defendant knew posed no threat to him. 2RP 168; 3RP 270, 277. Her injuries from the attack were recorded. 2RP 152, 154, 165-66; 4RP 333, 337, 349; Ex. 4-11. Defendant did not require medical attention. 2RP 134; 3RP 185-86, 276.

At the scene, defendant never claimed he was attacked or afraid. 2RP 140. He said she stole his phone. 2RP 140. This conclusion was surmised from her act of looking back at him from the end of the busy street where he left the phone unattended in an open car for nearly an

hour. 3RP 249, 265-66. He responded by chasing her down in his car, which he admitted was an "irrational, radical move." 3RP 249, 267. Once in range, he purportedly approached her on foot demanding the phone; she reacted by swinging her purse at him. 3RP 249. This is the only response he attributed to her. 3RP 249. She described him blindsiding her. 4RP 329. She fell, posing no threat to him. 3RP 250, 270. Still, he "tugged on [her] [purse] strap a couple more times." 3RP 250. 3RP 250. There was no proof the phone, if stolen, was in her purse. *E.g.*, 2RP 125-43; 3RP 271-72; 4RP 329-52. Other testimony proved he attacked her. *Id.*

Defendant proposed defense of self and property during motions *in limine*. 2RP 89-90. A ruling was reserved pending the presentation of facts and law to support instructing on those theories. *Id.* They were taken up by the court after both parties rested:

The remaining issue [is] whether a defense of property or a defense of self [] instructions should be given[.] Last week I told the attorneys [] I was inclined not to instruc[t] on either [.] But [defense counsel] wanted an opportunity to try to find [] law [to] persuade me [] it's appropriate[.]

4RP 379. Counsel responded:

I didn't find a specific case on point. I believe [] I saw a notation when I was going through jury instructions. It indicated [] one court determined they didn't [sic] know if the defense was applicable to retrieve property, but I didn't find anything specifically on point. But I don't have much more to add to that, other than we believe [] there's enough, even though it's not a great amount, that [defendant] did indicate [] he was attempting to retrieve his property and [] [the victim] was flailing around.

I think [] you are correct that I don't think he specifically stated [] he was in fear, but that's kind of where we are.

4RP 379-81. The court carefully decided to withhold both instructions:

Well, using force to recover property that is no longer in the possession of an individual and that was clearly [] defendant's testimony, that was his intention, using force to recover property that's no longer in his possession is very different than using force to protect property that is in his possession. Protecting one's property from damage, from malicious interference or theft, again, is on point of time different than once the property has been taken into possession by somebody else, and here we have a separation of some minutes, a separation of some blocks from the point at which [defendant] believed [] his phone was removed from his automobile. It's absolutely clear to me [] this [] phone [] he was trying to recover was no longer in his possession.

So the question of law becomes can he use any amount of force to recover a [] phone [] he believed [the victim] possessed. I am not aware of a single case in the State of Washington or any statutory authority that would let him do that []. I am unwilling to instruct the jury that as a matter of law he could use force to get back a [] phone [] he believed had been wrongly taken. [] He was acting offensively, not defensively to protect property. So I cannot and will not instruct on the use of force to protect property under these circumstances.

The next question is whether [] defendant [] produced sufficient evidence for me to instruct that he was defending himself[.] I listened carefully to [his] testimony. What I heard him tell the jury was [] the force he used, that is to say an effort to remove the purse from the grasp of [the victim], was done solely and exclusively to get his phone back. He denied ever laying a hand on [her]. He described that she went to the ground essentially because she tripped or lost her balance in the course of his effort to try to take

the purse away from her, that he did not assault her, that he did not forcibly take her to the ground in any way. His testimony to me was exclusively [] he us[ed] force [] to get his [] phone back, that [she] may or may not have had. We don't know from the evidence, but I did not hear the defendant even once testify [] he used force in defense of himself. And I don't think that would be a fair inference [] under the testimony [] I [] heard. And I cannot and will not instruct on justifiable use of force and defense of self. I d[o]n't believe the evidence supports it.

4RP 381-83.

- a. Defendant was a first aggressor without credible evidence of self-defense.
 - i. **Defendant's retaliatory pursuit of and attack upon the victim was not self-defense.**

Self-defense cannot be invoked by the first aggressor. *Janes*, 121 Wn.2d at 240; *State v. Currie*, 74 Wn.2d 197, 199, 443 P.2d 808 (1968); *State v. Callahan*, 87 Wn. App. 925, 930, 943 P.2d 676 (1997); *Walker*, 40 Wn. App. at 662; RCW 9A.16.020. It is equally unavailable to one who sets in motion events culminating in a physical altercation. *Walker*, 40 Wn. App. at 663. A victim's physical response to attack is incapable of supporting her assailant's claim of self-defense. *Id.* at 664; *Currie*, 74 Wn.2d at 199; *Janes*, 121 Wn.2d at 240.

The court rightly refused to instruct on self-defense as the evidence only proved defendant to be the first aggressor. Similar facts appear in *State v. Bolar*, 118 Wn. App. 490, 494-97, 78 P.3d 1012 (2003) where Division I held self-defense was unavailable. *Id.* at 507. Bolar shot

someone believed to be complicit in theft of his property. *Id.* at 494-97. "By his own theory of self-defense, Bolar went searching for [the victim], located him, and attacked in the first instance. Moreover, the evidence is very strong [] he acted in retaliation and revenge for the theft of his property and the loss of his girlfriend to a rival." *Id.* at 507.

Only the absence of rivalry and the method of attack differentiates *Bolar* from defendant's case. For defendant, by his theory of self-defense, searched for De Armond, located her on his street, chased her down in his car and attacked as she fled. 3RP 248-50, 267. He conceded she posed no threat and the attack described by others was not self-defense. 3RP 250, 270-72. Her alleged act of swinging a purse backward toward him would have been a reaction to his aggression. It cannot support his claim of self-defense. She was confronted with a man chasing after her in violation of a domestic violence restraining order. *See Walker*, 40 Wn. App. at 664; *Currie*, 74 Wn.2d at 199; *Janes*, 121 Wn.2d at 240. By his initially aggressive acts, he vested her with the right to repel or defend against him while divesting himself of a right to respond with force. The refusal to instruct on self-defense should be affirmed.

ii. **Retaliatory aggression aside, there is no credible evidence to support defendant's claim of self-defense.**

A defendant must overcome the initial burden of adducing credible proof of self-defense for the jury to be instructed on that theory. *Walker*,

40 Wn. App. at 662. Such evidence must show he subjectively perceived a reasonable threat of imminent harm. *Theroff*, 95 Wn.2d at 390. *State v. Read*, 147 Wn.2d 238, 243, 53 P.3d 26 (2002). The responsive force must be no more than necessary from the perspective of a reasonable person confronted with the situation defendant perceived. *State v. Werner*, 170 Wn.2d 333, 337, 241 P.3d 410 (2010); *State v. Walden*, 131 Wn.2d 469, 475, 932 P.2d 1237 (1997). If an element is unsupported, the theory is unavailable. *Walker*, 136 Wn.2d at 773; *State v. Griffith*, 91 Wn.2d 572, 575, 589 P.2d 779 (1979)). When supported, the State must disprove it. *State v. Acosta*, 101 Wn.2d 612, 618, 683 P.2d 1069 (1984).

Defendant never articulated subjective fear of De Armond, much less objectively reasonable fear. Nor can either attribute be inferred from his testimony he responded to her alleged effort to fend him off with her purse by continuing to tug at it as she fell to the ground. According to him, he never used intentional force against her person, which is another failure of fact undermining his self-defense claim. 3RP 282; *State v. Aleshire*, 89 Wn.2d 67, 71, 568 P.2d 799 (1977) ("One cannot deny [] he struck [] then claim [] he struck [] in self-defense."); *State v. Callahan*, 87 Wn. App. 925, 932, 943 P.2d 676 (1997). The force he indirectly applied through his effort to tear the purse from her body was not necessary as he did not perceive her as a threat. A self-defense instruction was properly withheld.

- b. Defendant was not entitled to a defense of property instruction because the force he used in violation of a domestic violence order was a far greater evil than the one he allegedly tried to prevent. There is also no credible evidence he had a good faith belief the victim stole his phone or that it was in the purse he tried to forcibly tear from her body as she fled.
 - i. **Defendant allegedly tried to retake his phone through the greater evil of physically attacking a woman he was prohibited from contacting by a domestic-violence order.**

Our Legislature pronounced clear public policy to protect domestic violence victims. RCW 26.50; 10.99 RCW. The purpose of the act is to recognize the importance of domestic violence as a serious crime against society as well as to assure victims the maximum protection from abuse the law can provide. *Freeman v. Freeman*, 169 Wn.2d 664, 671–72, 239 P.3d 557, 560 (2010); RCW 10.99.010. "Domestic violence presents unique challenges for law enforcement." *State v. Schultz*, 170 Wn.2d 746, 755, 248 P.484 (2011). For example, "[d]omestic violence situations can [] quickly escalate into significant injury." *Id.* (citing RCW 10.99.040(2)(a)). Our Legislature addressed this problem by strengthening DV laws. *State v. Allen*, 150 Wn. App. 300, 309-10, 207 P.3d 483 (2009).

Defenses for statutory crimes are dictated by Legislative policy. *State v. Mertens*, 148 Wn.2d 820, 831, 64 P.3d 633 (2003). A statute's plain meaning is given effect as the expression of legislative intent. *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005). Plain meaning is

discerned from language's ordinary usage, the statute's context and the scheme's related provisions. *Id.* The plain language of RCW 9A.16.020(3) generally permits the defense when force is used toward a person for one or more of the enumerated lawful purposes. *State v. Arth*, 121 Wn. App. 205, 209, 212, 87 P.3d 1206 (2004).

Still, interpretations leading to absurd results should be avoided. *State v. Eaton*, 168 Wn.2d 476, 480, 229 P.3d 704 (2010); *State v. J.P.*, 149 Wn.2d 444, 450, 69 P.3d 318 (2003). And RCW 9A.16.020(3) does not specifically address the situation where a party bound by a domestic violence order engages in self-help to retake property in the protected party's possession. Reading the general defense of property to permit self-help when an order prohibiting the contact is in place cannot be rationally reconciled with the statutory provision that specifically governs the safe transfer of property between parties under domestic-violence orders.

Specific statutory provisions control over general ones. *Anderson v. Dussault*, 181 Wn.2d 360, 371, 333 P.3d 395 (2014); *Diaz v. State*, 175 Wn.2d 457, 470, 285 P.3d 873 (2012); *Miller v. Sybouts*, 97 Wn.2d 445, 448, 645 P.2d 1082 (1982). Legislative purpose for specific provisions is ascertained by looking to provisions which stand in *pari materia*, for they are to be read together as a whole, so a harmonious statutory scheme evolves that maintains the integrity of respective provisions. *See Id.*; *State v. Wright*, 84 Wn.2d 645, 650, 529 P.2d 453, 457 (1974). Defendant was charged under RCW 26.50.110(4) and RCW 10.99.020 for committing an

act of domestic violence, which he claimed was justified under RCW 9A.16.020(3)'s general defense of property. Yet 10.99 RCW violations are enforced under 26.50 RCW. RCW 10.99.040(4)(a)-(b). And RCW 26.50.080's civil-standby provision provides for the supervised return of property in the DV context:

(1) When an order issued under this chapter upon request of the petitioner, the court may order a peace officer to accompany the petitioner and assist in placing the petitioner in possession of those items indicated in the order or to otherwise assist in the execution of the order of protection. The order shall list all items that are to be included with sufficient specificity to make it clear which property is included. Orders issued under this chapter shall include a designation of appropriate law enforcement agency to execute, serve, or enforce the order.

(2) Upon order of a court, a peace officer shall accompany the petitioner in an order of protection and assist in placing the petitioner in possession of all items listed in the order and to otherwise assist in the execution of the order.

Id.; *Osborne v. Seymour*, 164 Wn. App. 820, 846-47, 265 P.3d 917 (2011). Prohibited parties can only retake property from protected parties if authorized by the court. *Id.* Police cannot facilitate such transfers without that authorization. *Id.* at 846-49. Protected parties are likewise incapable of consenting to them. See *State v. Dejarlais*, 136 Wn.2d 939, 943-44, 969 P.2d 90 (1998).

Courts would have to ignore the role reconciliation plays in the cycle of violence to permit parties to privately modify domestic-violence

orders. But courts recognize reconciliatory collaboration often occurs after violence and before increased violence. *State v. Dejarlais*, 88 Wn. App. 297, 303, 944 P.2d 1110 (1997) (affirmed *Dejarlais*, 136 Wn.2d at 943-44). Courts realize offenders often pressure protected parties to act against their interests. *E.g.*, *State v. Young*, 160 Wn.2d 799, 807-09, 161 P.3d 967 (2007). Barriers to extra-judicial modifications of DV orders serve the Legislature's purpose, for "[a]ll persons affected [] are served by a clear rule of enforcement[.]" *Dejarlais*, 88 Wn. App. at 304.

Allowing prohibited parties to use RCW 9A.16.020(3)'s defense of property to circumvent DV orders undermines RCW 26.50.080's specific purpose of ensuring peaceful transfers of property among those locked in a cycle of violence. It would also create a self-help loophole antithetical to the protective purpose of DV orders. For comingled property will exist in almost every domestic relationship. And with it an ever-present pretext for initiating prohibited contact. This death blow to enforceability would be the price paid to permit self-help where there is no urgency in the DV context since a protected party is not an unknown thief capable of taking a prohibited party's property with impunity if not immediately apprehended. *State v. Self*, 42 Wn. App. 654, 657-58, 713 P.2d 142 (1986); *State v. Larsen*, 23 Wn. App. 218, 219-20, 596 P.2d 1089 (1979); *State v. Steele*, 150 Wash. 466, 273 P. 742 (1929)).

Situations where one commits crime to prevent crime are typically addressed under the affirmative defense of necessity. That defense calls

upon defendants to prove a lesser evil was committed to avoid a greater; the choice was not of the defendant's making; and there was no reasonable legal alternative to breaking the law. *State v. White*, 137 Wn. App. 227, 230, 152 P.3d 364, 365 (2007); *State v. Jeffrey*, 77 Wn. App. 222, 224–25, 889 P.2d 956 (1995); *State v. Diana*, 24 Wn. App. 908, 914, 604 P.2d 1312 (1979)); RCW 9A.16.010(1). The defense has a recognized capacity to undermine the rule of law. For in the moment of action, it leaves to the person who will profit from crime to decide the crime's necessity:

So spake the Fiend, and with necessity,
The tyrant's plea, excused his devilish deeds.

E.g., The Queen v. Dudley and Stephens, 14 Q.B.D. 273, 282 (1884); *see also e.g., State v. Mannering*, 112 Wn. App. 268, 274-75, 48 P.3d 367 (aff'd, 150 Wn.2d 277, 75 P.3d 961 (2003)) (choice of evils rationale presumes threatened harm is greater than the resulting harm); *People v. Velasquez*, 158 Cal.App.3d 422, 204 Cal.Rptr. 640 (1984).

Violation of a domestic violence no-contact order should never prove the lesser evil when paired against alleged property crime. One can readily respond to thefts perpetrated by protected parties by calling the police. Stolen property can be retaken through civil-standby orders or otherwise addressed through civil actions. *See Seymour*, 164 Wn. App. at 846; *see also e.g., Ceager v. State*, 737 N.E.2d 771, 777 (2002) (self-defense not allowed where order prohibited defendant from place where

force was used); *State v. Cobb*, 153 Ohio.App.3d 541, 545, 795 N.E.2d 73 (2003); *Rhames v. State*, 907 P.3d 21, 25-26 (1995).

Assuming the truth of defendant's testimony, he committed a Class C felony violation of a domestic violence order predicated on assault to stop a known protected party from committing a misdemeanor theft of his phone. RCW 26.50.110(4); RCW 9A.56.050. According to him, it was an "irrational, radical move" he made after choosing not to call police from a neighbor's house. 3RP 266-67. He plainly chose the greater of two evils. A greater evil RCW 9A.16.020(3) was not enacted to condone. Defense of property pursuant to that statute should be unavailable to the violator of a domestic-violence order as a matter of law. Only necessity can excuse the commission of one crime to prevent the occurrence of another.

ii. Defendant was not defending his phone by trying to steal a purse of unknown contents from the victim as she fled.

Belief in impending injury is not required for defense of property. *State v. Bland*, 128 Wn. App. 511, 513, 116 P.3d 428 (2005). "[A] contrary rule would prevent an owner of property who caught a thief in the act of carrying away that property from retaking it by force. See *Larsen*, 23 Wn. App. at 219-20 (citing *Steele*, 150 Wash. 466)). Yet, the defense is predicated on a good faith claim to the property defended. See *Theroff*, 95 Wn.2d at 390 (citing *Peasley v. Pudget Sound Tug & Barge Co.*, 13 Wn.2d 485, 125 P.2d 681 (1942)); *Self*, 42 Wn. App. at 657-58. This calls

for a legal or factual basis supporting the claim, even if untenable. *State v. Alger*, 128 Wn.2d 85, 95, 904 P.2d 715 (1995). There must be more than a vaguely asserted right. *Id.*

Even where one possesses a good faith claim to stolen property, defense of property can only be invoked to retake the specific property stolen by the thief. The defense does not vest the victim with a general license to forcibly take from the thief other property to which the victim has no claim. *Self*, 42 Wn. App. at 657-58 (no claim of title in cash, wallet and other property taken by force). Allowing victims of property crime to settle the score by forcibly exacting restitution from thieves would be "one step short of accepting lawless reprisal [to] redress[s] grievances, real or fancied." *Id.* The result would be a state of nature Washington avoids by "eschew[ing] self-help through violence." *Id.*

There was no credible evidence to support defendant's self-serving conclusion De Armond stole his phone. According to him, it was charging in a mostly unattended car with a missing-passenger window along a road with heavy pedestrian traffic for about an hour. 3RP 247-49, 260-64, 280-81. His only specious connection between her and the phone from his telling of the tale is the fact he first noticed the phone was missing after some passerby drew his attention; after which, he saw her walking down the street looking back at him. 3RP 249, 265-66. Based on no more than this correlative suspicion he decided she was the culprit. 3RP 249-50, 265-67. He then chased her down and attempted to rip a purse from her body.

Defendant conceded at trial this was an "irrational [] move." 3RP 267. He is correct for several reasons. One is an inability to soundly infer she took the phone from the facts he claimed to know at the time. The scenario he described made it just as probable some unidentified passerby took the phone from the open car sometime in the hour or so it was left unattended. Her innocuous presence at the end of a public street where a phone belonging to him came up missing, without more, does not support a particularized suspicion of her involvement. *E.g.*, ***State v. Martinez***, 135 Wn. App. 174, 181-82, 143 P.3d 855 (2006). That extremely attenuated-correlative link could not have empowered a police officer to detain her, let alone confiscate her purse. *E.g.*, ***State v. Martinez***, 135 Wn. App. 174, 177-78, 143 P.3d 855 (2006). Yet according to defendant, it is sufficient to empower a DV offender under restraining order to do so. Fortunately, he does not make law. *E.g.* ***Self***, 42 Wn. App. at 657-58; ***Seymour***, 164 Wn. App. 820, 846, RCW 26.50.080. His failure to adduce credible proof the victim took his phone was reason enough to withhold the instruction.

A related evidentiary failing attends the absence of any facts from which to infer the missing phone was in her purse as opposed to a pocket or hiding place somewhere between his car and the place he accosted her. Without reason to believe the phone was in her purse, the purse cannot even be loosely described as specific property to which he had a claim. The lawful force statute did not license him to take her purse in retaliation for her taking his phone, if culpability for that theft is assumed. ***Self***, 42

Wn. App. at 657-58. So his means of self-help was illegal regardless of whether his right to defend against ongoing interference with his property was present. The instruction was rightly withheld.

c. The absence of an instruction on defense of self or property was harmless, if error.

Failure to properly instruct on defense of self or property is not automatically constitutional error much less presumptively prejudicial. *State v. O'Hara*, 167 Wn.2d 91, 102-03, 217 P.3d 756 (2009). Even where a presumption of prejudice lies, the error may prove harmless if the verdict is supported by overwhelming evidence. *Id.*; *State v. Brown*, 147 Wn.2d 330, 341, 58 P.3d 889 (2002); *Neder v. United States*, 527 U.S. 1, 9, 119 S.Ct. 1827 (1999)); *State v. Robinson*, 38 Wn. App. 871, 876, 691 P.2d 213 (1984).

Overwhelming evidence proved defendant violently overreacted to his fanciful suspicion about De Armond's petty theft, making the omitted instructions harmless if error. For if one assumed he knew she stole his phone. And further assumed he knew it was in her purse. No reasonable jury would endorse the force he used against her. He admittedly yanked at her purse strap while she was incapacitated on her back. 3RP 249-50, 270. But his need to use force ended when he thwarted her great escape by sending her to the ground. They were visible on a thoroughfare with bystanders looking on, one of whom called 911. 2RP 125-27, 132.

Yet that version takes his impeached testimony at face value. The Good Samaritan who intervened described a brutal beating. From "about four feet" away, he saw defendant lift the victim up and slam her to the ground probably three times. 2RP 128, 138, 143. As an off duty security officer compelled by conscience to rescue a stranger from an attack, his credibility was not in doubt. The circumspection with which he testified further credited his account. *E.g., compare* 2RP 127 *with* 2RP 128, 138, 143. An account corroborated by De Armond's testimony as well as her documented injuries. 4RP 325, 351-52. At sentencing, the court remarked upon the credibility problems with defendant's testimony. 4RP 460. There is no reason to assume they were lost on jurors. Defendant's convictions should be affirmed.

2. THE STATE WAS RIGHTLY ALLOWED TO REOPEN ITS CASE SO THE VICTIM COULD TESTIFY ABOUT THE ATTACK BEFORE THE JURY WAS INSTRUCTED BECAUSE THE MISCOMMUNICATION RESPONSIBLE FOR HER DELAYED APPEARANCE WAS NOT A SOUND REASON TO WITHHOLD PROOF OF DEFENDANT'S GUILT THAT PRE-TRIAL DISCOVERY PREPARED HIM TO ADDRESS.

Defendants have no right to tailor their testimony to the evidence. *See State v. Martin*, 171 Wn.2d 521, 535-38, 252 P.3d 872 (2011). And Judges soundly advance the truth-seeking function of trials by ensuring juries receive admissible evidence material to assessing the credibility of

testifying defendants. *See Id.* at 537-38; *State v. Hamilton*, 47 Wn. App. 15, 20-21, 733 P.2d 580 (1987); *Jenkins v. Anderson*, 447 U.S. 231, 238, 100 S.Ct. 2124 (1980)). It is prudently left to presiding judges whether to reopen cases for victims of crimes on trial to testify. *See Estes v. Hopp*, 73 Wn.2d 263, 270-71, 438 P.2d 205 (1968) (reopened to cure defect raised in defense motion to dismiss, *i.e.*, proof of ownership); *State v. Vickers*, 18 Wn.App. 111, 113, 567 P.2d 675 (1977) (jurisdiction); *Seattle v. Heath*, 10 Wn. App. 949, 953, 520 P.2d 1392 (1973); ER 102, 402-03. Decisions to reopen are affirmed unless discretion is prejudicially abused. *Id.*; *State v. Brinkley*, 66 Wn. App. 844, 848, 837 P.2d 20 (1992).

Internal miscommunication led the State to proceed believing the victim could not be found. 1RP 24. The trial prosecutor reviewed the file after both parties rested for information related to defendant's request for a missing-witness instruction. 4RP 293. He discovered an advocate's note about the victim's imprisonment at a Thurston County DOC facility. 4RP 293. She had been there for about one month, which included a few days of trial. *Id.* The State moved to reopen its case for her testimony. 4RP 293-94. Defendant objected to preserve the advantage of the missing-witness instruction, yet could not provide a legitimate explanation for how he was prejudiced. 4RP 297-306; WPIC 5.20. Her testimony was allowed:

[COURT:] I see this as simple neglect that would be more harmful to the plaintiff than to the defendant. I am not able to find that -- I am just not convinced [] the defendant is prejudiced []. The decision to testify is his own. And he's

offered that testimony knowing full well [the victim] was on the witness list, knowing [] there's a [] possibility [a medical witness she spoke to] might be called to testify in rebuttal. I have to exercise my discretion to give both sides a fair trial in this case, and I am certainly confident [] the jury would be benefitting from hearing [her] in order to make a proper decision in this case. I fail to see unfair prejudice to [] defendant if [she] testifies [.] Her testimony is going to [] be limited to the interaction between her and [] defendant. In other words to be in rebuttal of what [] defendant [] testif[ied]. [] The defense [] had the discovery [] which describes what [she] said to law enforcement and said to the medical provider. The defense will have further opportunity to recall [defendant].

4RP 307-08. Defendant had an opportunity to interview her. 4RP 308. He tried to impeach her with cross-examination. 4RP 347-58. He was allowed to respond to her through surrebuttal. 4RP 370-71. He tried to discredit her in summation. 4RP 408-18, 421. But proof of his guilt prevailed. CP 62-65.

There is nothing in the record to support defendant's claim the trial court abused its discretion by permitting the State to reopen its case. The jury deserved to hear from the woman he was accused of assaulting. He first claims the ruling prejudiced him as her testimony followed his own. But he had no right to testify free of impeachment. *See State v. Ray*, 116 Wn.2d 531, 546, 806 P.2d 1220 (1991); *Martin*, 171 Wn.2d at 535-38; *Brinkley*, 66 Wn. App. at 850. Reopening the case did not impair his right to testify or to remain silent. *See Id.*; *State v. Jobe*, 30 Wn. App. 331, 335, 633 P.2d 1349 (1981). Cases are replete with difficult decisions about

which course to choose. See *State v. Brown*, 113 Wn.2d 520, 539-40, 787 P.2d 906 (1990); *McGautha v. California*, 402 U.S. 183, 213, 91 S.Ct. 1454 (1971)); *Brinkley*, 66 Wn. App. at 850-51.

Having received forewarning of what his victim would likely say if found through pre-trial discovery and his participation in the incident, he testified assuming the risk she might be found, and if found, permitted to testify in rebuttal. See *State v. Swan*, 114 Wn.2d 613, 652-55, 790 P.2d 630-61 (1990). The strategy of leveraging a victim's absence to mislead jurors has no place in our courts. For in our courts, "when defendants testify, they must testify truthfully or suffer the consequences." *Nix v. Whiteside*, 475 U.S. 157, 174, 106 S.Ct. 988 (1986); 4RP 297, 460.

On appeal, he claims the victim's placement at the end of the trial emphasized her testimony. One flaw in this contention is conceptual. The State's rebuttal witnesses always appear after the defense rests. See *Swan*, 114 Wn.2d at 652-63. Just as the State addresses the jury last through its rebuttal argument. The order derives from the State's burden. Rebuttal's timing is only prejudicial when the State withholds substantial evidence for issues it must prove in its case-in-chief merely to present it cumulatively at the end of a defendant's case. *Swan*, 114 Wn.2d at 652. Rebuttal may otherwise overlap with the evidence in chief to some degree *Id.* at 653. The court found De Armond's absence was not part of a tactic to hold back her testimony. 4RP 306. That finding is a verity in this appeal. *State v. Cherry*, 191 Wn. App. 456, 464, 362 P.3d 313 (2015).

A second flaw is De Armond was not the last witness. Defendant testified in surrebuttal. 4RP 369-71. Neither the jurors' verdicts nor their presumptively followed instructions can be reconciled with his theory the timing of a witness's testimony overwhelms a jury's capacity to weigh it against other evidence. CP 67-68. Every attribute of a sound decision to reopen a case is present. See *Brinkley*, 66 Wn. App. at 848-51. Each means of reasonably mitigating the impact on defendant was employed. *Id.* The prejudice he hinted at below was the loss of an invalid ability to skew facts through combining his testimony with a missing-witness instruction. His revised claims of prejudice either fail on the law or the facts. He was "entitled to a fair trial not a perfect one." *Bruton v. United States*, 391 U.S. 123, 135, 88 S.Ct. 1620 (1968). And a fair trial he received.

The irregularity was also harmless if error as the Good Samaritan's description of defendant slamming De Armond to the ground would have overwhelmingly proved his guilt for VPO when added to her documented injuries even if she remained unavailable. His conviction for bail jumping is not implicated by this claim. So both convictions should be affirmed.

3. DEFENDANT'S PREMATURE REQUEST TO PASS COSTS ALONG TO OUR TAXPAYERS SHOULD BE DENIED AS A COST BILL HAS NOT BEEN SUBMITTED AND THERE IS NO INJUSTICE IN A RECIDIVIST DOMESTIC-VIOLENCE OFFENDER BEING ORDERED TO REPAY THE PUBLIC FOR HIS APPEAL.

- a. Defendant's objection should await a bill.

Review of appellate costs should await an objection to a bill. RAP 14.4-14.5; *State v. Sinclair*, 192 Wn. App. 380, 389-90, 367 P.3d 612 (2016); *State v. Caver*, 195 Wn. App. 774, 784-86, 381 P.3d 191 (2016); *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000); *State v. Blank*, 131 Wn.2d 230, 243-44, 930 P.2d 1213 (1997). Defendant should not be preemptively insulated from repaying the public for his appeal.

- b. Money defendant receives would be well directed to repayment of costs.

RCW 10.73.160(1) authorizes the imposition of appellate costs. Imposition of costs has been historically considered an appropriate means of ensuring able-bodied offenders "repay society for [] what it lost as a result of [their] crime." *State v. Barklind*, 87 Wn.2d 814, 820, 557 P.2d 314 (1976). This community-centric concept of restorative justice has been recently subordinated to an offender-centric concern for difficulties anticipated to attend repayment. *State v. Blazina*, 182 Wn.2d 827, 835-37, 344 P.3d 680 (2015). Ability to pay is not an indispensable concern. *Sinclair*, 192 Wn. App. at 389.

Defendant revealed himself able enough to chase down a woman he was prohibited from contacting and to brutally beat her until a machete wielding Good Samaritan intervened. And this was not the first time he demonstrated similar prowess within a domestic relationship. He also has proven access to resources. He owned a car, paid for phone plans, landed a job and has employment prospects. *E.g.* 4RP 456-57.² Directing some of the money he earns to repaying the public for costs incurred on his behalf is far more just than shifting them to hardworking taxpayers, who rarely if ever avail themselves of judicial resources recidivists like defendant too regularly consume.

D. CONCLUSION.

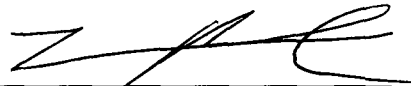
Defendant assaulted his ex-girlfriend in violation of a no-contact order to take a purse that did not belong to him, without reason to believe it contained his property; accordingly, instructions on defense of property and self were correctly withheld. The State was fairly permitted to reopen

² **Defendant:** "I got the guy right here that would offer me a job if I got out." 4RP 457.

its case so jurors could hear from the victim. Defendant is a recidivist domestic violence offender who should pay for his appeal.

RESPECTFULLY SUBMITTED: February 13, 2017.

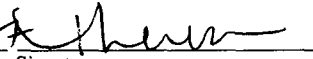
MARK LINDQUIST
Pierce County
Prosecuting Attorney



JASON RUYF
Deputy Prosecuting Attorney
WSB # 38725

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perjury of the laws of the State of Washington. Signed at Tacoma, Washington,
on the date below.

2-15-17 
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